ORIGINAL

No. 96-8986

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARNOLD F. HOHN

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's motion under 28 U.S.C. 2255, which alleged that his conviction under 18 U.S.C. 924(c) for using and carrying a firearm during and relation to a drug trafficking crime could not stand under this Court's later decision narrowing the "use" element in Bailey v. United States, 116 S. Ct. 501 (1995), made a purely statutory claim, or made a "substantial showing of the denial of a constitutional right" as required to obtain a certificate of appealability under 28 U.S.C. 2253(c)(2).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 99 F.3d 892 (1996).

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1996. A petition for rehearing was denied on February 10, 1997. The petition for a writ of certiorari was filed on May 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for th District of Nebraska, petitioner was convicted of possession of ethamphetamine within 1,000 feet of a public school with intent to

distribute it, in violation of 21 U.S.C. 845(a); using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g) and 924(a)(2). Petitioner appealed his sentence and the court of appeals affirmed. United States v. Hohn, 8 F.3d 1301 (8th Cir. 1993).

Petitioner then filed a motion under 28 U.S.C. 2255, challenging his conviction under 18 U.S.C. 924(c)(1). The district court dismissed the motion, Pet. App. 8a-9a, and the court of appeals denied petitioner's request for a certificate of appealability. Id. at 1a-7a.

1. The evidence at trial showed that, on June 20, 1990, police officers executed a search warrant at petitioner's house in Omaha, Nebraska. As a result of their search, police recovered approximately 16 grams of methamphetamine, including one gram recovered from petitioner's person. The police discovered in a brown case on the kitchen counter 12 grams of methamphetamine that was packaged for redistribution. Within arm's reach of the methamphetamine, the police found a loaded .380 caliber semi-automatic pistol, a loaded Colt revolver, and a loaded Ruger .357 pistol. The .380 caliber semi-automatic pistol and the Colt revolver were in holsters. The police also found in the kitchen a grinder bearing methamphetamine residue, a Ruger .22 caliber semi-automatic pistol, and an Excam .22 caliber revolver. On top of a dresser in petitioner's bedroom, police discovered a cigarette pack containing three grams of methamphetamine, a loaded handgun and

$293 in currency. Pet. App. 25a; Gov't Br. in Opp. to Pet. for Rehearing ("Gov't Rehearing Brief") at 2; see also Pet. App. 15a.

2. Petitioner appealed, but did not challenge the sufficiency of the evidence to support his conviction under 18 U.S.C. 924(c)(1). The court of appeals affirmed. United States v. Hohn, 8 F.3d 1301 (8th Cir. 1993).

3. On December 6, 1995, this Court held, in Bailey v. United States, 116 S. Ct. 501 (1995), that a conviction for use of a firearm under Section 924(c) "requires evidence sufficient to show an active employment of the firearm by the defendant." Id. at 505. Active employment includes uses such as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire" the weapon. Id. at 508. By contrast, possession of a firearm -- without more -- does not constitute a "use," nor does "placement of a firearm to provide a sense of security or to embolden[.]" Ibid.

4. Petitioner filed a pro se motion under 28 U.S.C. 2255 making two claims. First, he contended that, under Bailey, the facts established at his trial were insufficient to support a conviction for violating Section 924(c)(1). Petitioner acknowledged that he had not raised such an insufficiency claim on direct appeal, but argued that his default should be excused because his conduct "was not a crime" and, therefore, it would be a "fundamental miscarriage of justice" not to review his claim. Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, at 8. Second, petitioner challenged the jury

instructions at his trial. He argued that the jury instructions did not properly define the phrase "use a firearm" to require proof of active use, and that correct jury instructions would likely have produced an acquittal. Id. at 11.

In response, the government contended that petitioner was not entitled to relief under Bailey because the evidence at trial was sufficient to show that petitioner had "carried" a firearm. Noting that the police found weapons in holsters within arm's reach of methamphetamine in petitioner's kitchen, the government argued that the jury could infer that petitioner had "entered his residence and placed his belongings, which included the methamphetamine and the firearms, onto the counter." Pet. App. 25a-26a. The government acknowledged that, under Bailey, the jury instructions at petitioner's trial erroneously defined the word "use," but it contended that the error was harmless because "[t]he evidence obviously establishes 'carrying.'" Id. at 22a-26a.

The district court held that petitioner had waived his Bailey claim by failing to raise it on direct appeal. Pet. App. 8a-9a. In so holding, the court relied on United States v. McKinney, 79 F.3d 105, 109 (8th Cir. 1996), in which the Eighth Circuit held that a defendant who had not raised a Bailey claim at trial or in his initial brief on direct appeal had waived it. This Court recently vacated and remanded McKinney for further consideration in light of Johnson v. United States, 117 S. Ct. 1544 (1997). McKinney v. United States, 117 S. Ct. 1816 (1997).[1]

5. a. On April 24, 1996, while petitioner's Section 2255 motion was pending in the district court, the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("the Act" or "the AEDPA"). Title I of the Act made changes to the law governing motions for collateral relief for federal prisoners under 28 U.S.C. 2255. Section 102 of the Act amended 28 U.S.C. 2253 to require a prisoner to obtain a "certificate of appealability" before appealing from a district court's denial of his Section 2255 motion. The new provision states that "unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a proceeding under section 2255." 28 U.S.C. 2253(c)(1)(B). A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2).

b. On July 29, 1996, petitioner sought to appeal from the district court's decision denying his motion. See Gov't Rehearing Brief 4. The court of appeals, however, denied him a certificate of appealability, concluding that he had not made a "substantial showing of the denial of a constitutional right." Pet. App. 1a-2a. The court noted that petitioner had argued in the district court in

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[1] On remand, the Eighth Circuit reached the merits of McKinney's Bailey claim and vacated his conviction. The court held that evidence that McKinney kept weapons in a drug fortress did not show that he had used weapons under Section 924(c). United States v. McKinney, No. 95-2132, 1997 WL 395262 (8th Cir. July 16, 1997).

his motion for collateral relief that the jury instructions at his trial were inconsistent with Bailey. As a result, the court of appeals concluded, "petitioner is not making a constitutional claim. He is making a claim to a federal statutory right." Ibid. Because "Bailey did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution," the court of appeals denied a certificate of appealability. Id. at 2a.

Judge McMillian dissented. Id. at 2a-7a. After noting that courts have granted post-conviction relief following a change in the law, the dissent stated that "'a judgment in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law.'" Pet. App. 6a (quoting United States v. Liguori, 438 F.2d 663, 669 (2d Cir. 1971)). The dissent also found that petitioner had "cause" for failing to challenge the jury instructions on appeal "[b]ecause Bailey represents such a clear break with precedent regarding the definition of 'use' under § 924(c)(1)." Id. at 7a. Accordingly, the dissent concluded that this case presented a "substantial showing of the denial of a constitutional right." Ibid.

Petitioner sought rehearing, with a suggestion for rehearing en banc. In opposing further review, the government took the position that the panel's decision was correct. The full court of appeals denied rehearing en banc, with Judges McMillian, Beam, Loken, and Hansen dissenting. Pet. App. 21a.

DISCUSSION

Petitioner seeks review of the court of appeals' holding that he was not entitled to a certificate of appealability because his claim -- that he is presently incarcerated for conduct that, under Bailey, is not criminal -- raises a statutory, not a constitutional, issue. We agree that claims of the kind raised by petitioner in his motion under Section 2255 may fairly be characterized as "constitutional," and that the court of appeals erred in concluding otherwise. Accordingly, we believe that the judgment of the court of appeals should be vacated and the case remanded for further consideration of whether a certificate of appealability should be granted here.

1. In Bailey, this Court "clarif[ied] the meaning of 'use' under § 924(c)(1)" by looking to "the language of the statute" and "consider[ing] not only the bare meaning of the word ['use'] but also its placement and purpose in the statutory scheme." 116 S. Ct. at 506. That holding resolved a question of statutory construction. The Court did not purport to apply or construe the Constitution, but rather "determine[d] the meaning Congress intended." Id. at 505-506. Thus, "Bailey did not establish a new rule of constitutional law, but simply interpreted a substantive criminal statute." In re Dorsainvil, No. 96-8074, 1997 WL 409442 at *3 (3d Cir. July 23, 1997) (citing cases from the Fourth, Seventh, Tenth, and Eleventh Circuits agreeing with that proposition).

The fact that petitioner's Section 2255 motion invoked a

statutory holding of this Court, however, does not mean that his claim is purely a statutory one. In bringing a collateral challenge to the sufficiency of the evidence and the adequacy of the jury instructions, a movant under Section 2255 is entitled to rely on the statutory meaning of the word "use" as later interpreted by this Court in Bailey.[2] A contention that, in light of Bailey, the evidence was insufficient to support a conviction under Section 924(c)(1) may state a claim under the Due Process Clause. See Jackson v. Virginia, 443 U.S. 307, 313-316 (1979) (Due Process Clause requires that a criminal conviction rest on evidence sufficient to support a conclusion by a rational trier of fact that every element of the offense has been established beyond a reasonable doubt). A contention that the jury instructions failed to require the jury to make findings on every essential element of the offense under Section 924(c), as construed in Bailey, may state a claim under the Fifth and Sixth Amendments. See United States v. Gaudin, 115 S. Ct. 2310, 2320 (1995) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."). Petitioner raised claims of both varieties

[2] Several courts of appeals have so held in considering motions under Section 2255 relying on Bailey. See, e.g., Stanback v. United States, 113 F.3d 651, 654 & n.2 (7th Cir. 1997); United States v. McPhail, 112 F.3d 197, 199 (5th Cir. 1997); United States v. Barnhardt, 93 F.3d 706, 708-709 (10th Cir. 1996). Courts have reached the same conclusion in considering other new decisions narrowing the substantive scope of a criminal statute. See United States v. McKie, 73 F.3d 1149, 1153 (D.C. Cir. 1996); United States v. Dashney, 52 F.3d 298, 299 (10th Cir. 1995); United States v. Good, 969 F.2d 774 (9th Cir. 1992).

in his pro se motion for collateral relief under 28 U.S.C. 2255. See pp. 3-4, supra.[3]

Claims of the sort that petitioner raised do not automatically satisfy Section 2253(c)(2)'s requirement of a "substantial showing of the denial of a constitutional right." For example, a claim under Section 924(c) that the evidence was insufficient to show a "use" of a firearm in light of Bailey would not constitute a substantial showing of the denial of a constitutional right absent an indication that the evidence was insufficient to show a "carrying." See United States v. Eyer, 113 F.3d 470, 475-476 (3d Cir. 1997) (Section 924(c) conviction can be sustained based on evidence of "carry" without regard to "use"). But Section 2253(c)(3) does not require certainty that the collateral petitioner would prevail. See Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (to make a substantial showing, a petitioner must demonstrate that the issues are "'debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'") (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980) (emphasis in original; internal quotation marks omitted)). The court of appeals did not evaluate

[3] In Davis v. United States, 417 U.S. 333 (1974), this Court considered a Section 2255 motion claiming that the defendant had been convicted for an act that the law did not make criminal, as established by an intervening decision interpreting substantive law. The Court held that such a claim was cognizable under Section 2255 as a statutory claim. 417 U.S. at 342-347. Davis, however, did not address whether a narrowing construction of a substantive criminal statute might support a constitutional claim on collateral attack as well.

the substantiality of petitioner's showing in this case, because it held that petitioner's reliance on Bailey failed to raise a constitutional claim. In our view, that basis for the court of appeals' decision is mistaken.

2. Although we believe that a remand is required to reconsider whether petitioner can make a "substantial showing of the denial of a constitutional right," no remand is needed to reconsider the threshold issue of whether petitioner was required to obtain a certificate of appealability. The petition does not ask this Court to review whether the certificate-of-appealability requirement applies in this case. In Lindh v. Murphy, 117 S. Ct. 2059 (1997), however, which was decided after the petition was filed, this Court concluded that Congress generally intended "to apply the [AEDPA] amendments to chapter 153 only to such cases as were filed after the statute's enactment." Id. at 2063, see id. at 2068. In so holding, the Court reasoned that the express provision that the Act's amendments to Chapter 154 of Title 28 "shall apply to cases pending," AEDPA § 107(c), implied that the Act's amendments to Chapter 153 of Title 28 should not apply to pending cases. Id. at 2063.

The Act's provision requiring a certificate of appealability for federal prisoners is an amendment to Chapter 153 of Title 28; accordingly, under Lindh, that provision does not apply to "cases pending" on April 24, 1996, the effective date of the Act. The facts of Lindh, however, did not involve a petition for post-conviction relief in which the appeal was filed after the effective

date of the Act. See id. at 2061-2062. And the Court did not address whether, for purposes of the applicability of the certificate-of-appealability requirement, the "case" that has to be pending on the effective date of the Act is the "case" on appeal or the original "case" filed in the district court. In this instance, petitioner's motion for relief was filed in the district court before the effective date of the Act, but his case on appeal was filed after the effective date of the Act. We believe that such a case is subject to the Act's certificate of appealability requirement because the appeal -- the relevant case -- was neither "filed" nor "pending" on April 24, 1996.[4]

In Tiedeman v. Benson, No. 96-3977, 1997 WL 437181 (August 6, 1997), the Eighth Circuit recently agreed that a certificate of appealability is required whenever the notice of appeal was filed after the effective date of the Act, and that Lindh does not require otherwise. Tiedeman attempted to appeal from a district court order denying his petition for habeas corpus. Before the court of appeals, Tiedeman contended that Section 2253(c)(1)'s certificate-of-appealability requirement did not apply in his case because he had filed his petition for habeas corpus in the district

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[4] The Court has denied certiorari in five cases in which courts of appeals applied the certificate of appealability requirement to cases (like this one) that were pending in the district court on the effective date of the Act, but in which a notice of appeal was not filed until after that date. Matthews v. United States, No. 96-8310, cert. denied, 117 S. Ct. 2485 (1997); Zarnes v. United States, No. 96-1324, cert. denied, 117 S. Ct. 1842 (1997); Durham v. United States, No. 96-7329, cert. denied, 117 S. Ct. 1699 (1997); England v. United States, No. 96-6826, cert. denied, 117 S. Ct. 969 (1997); Travis v. United States, No. 96-6585, cert. denied, 117 S. Ct. 968 (1997).

court before the enactment of the AEDPA.[5] 1997 WL 437181 at *3. The court of appeals disagreed. It distinguished Lindh on the ground that the particular provision at issue in that case involved "substantive standards for review of state-court judgments by habeas courts." Ibid. Moreover, the court continued, "we can think of no reason why a new provision exclusively directed towards appeal procedures would depend for its effective date on the filing of a case in a trial court, instead of on the filing of a notice of appeal or similar document." Ibid. Accordingly, the court of appeals concluded that the certificate-of-appealability requirement applied to Tiedeman because his notice of appeal was filed after the Act's effective date. Ibid. Because the Eighth Circuit has already concluded that the certificate-of-appealability requirement applies where, as here, the notice of appeal was filed after the effective date of the Act, no remand is required for reconsideration in light of Lindh.

We recognize that three courts of appeals have held, since Lindh, that the certificate-of-appealability requirement does not apply to petitions for post-conviction relief that were filed in the district court before the effective date of the Act. United States v. Carter, 117 F.3d 262, 264 (5th Cir. 1997) (holding that "[f]ollowing Lindh, * * * § 2255 appellants are not subject to this [certificate-of-appealability] requirement unless their § 2255

[5] 28 U.S.C. 2253(c)(1)(A) requires a certificate of appealability to appeal from "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court."

petitions were filed in the district court after the AEDPA's effective date of April 24, 1996."); Nelson v. Walker, No. 96-2354, 1997 WL 442686 (2d Cir. August 7, 1997) (holding that the requirement in 28 U.S.C. 2253(c)(3) (as amended) that the certificate of appealability identify which issue(s) merit appeal under Section 2253(c)(2) does not apply to an appeal from denial of a habeas petition filed before the Act's effective date); Arredondo v. United States, Nos. 96-2126/2583, 1997 WL 459716 (6th Cir. August 13, 1997) (holding that appellant whose Section 2255 motion was pending on the effective date of the Act is not required to obtain a certificate of appealability); but cf. Letter dated July 17, 1997 from Leonard Green, Clerk, to United States, Handy v. United States, No. 96-2594 (6th Cir.) (directing the government to respond to a petition for rehearing en banc on the issue whether "§ 2255 petitioners are subject to the certificate of appealability requirement of the [AEDPA] if their § 2255 petitions were filed in the district court before April 24, 1996, when the Act became effective."). That disagreement, however, concerns an issue that is of rapidly diminishing importance, will affect the outcome in only a handful of cases, and is unlikely, in our view, to be determinative of the appeal in this case. Accordingly, this Court's review of the applicability of Lindh to a case in the procedural posture presented here is not warranted.

3. Because this case should be remanded, this Court need not address any of the additional issues identified by petitioner. First, this Court need not consider at this juncture petitioner's

claim that the language in Section 2253(c)(2), requiring a "substantial showing of the denial of a constitutional right," should be read to permit appeals of statutory claims. Pet. 13-19.

Second, petitioner's challenge to the district court's conclusion that petitioner had "waived" his claim by failing to raise it on direct appeal is not ripe. The court of appeals did not address that holding in its order denying a certificate of appealability. The court of appeals may reach that claim on remand, however, because a defendant whose constitutional claim is procedurally barred cannot prevail on the merits or make a "substantial showing of the denial of a constitutional right." Tucker v. Johnson, No. 97-20101, 1997 WL 367348 at *4 (5th Cir. 1997) (denying certificate of probable cause where petitioner cannot show that she can overcome her procedural default).[6]

Third, certiorari is not appropriate to consider whether petitioner's conduct constituted a "carrying" under Section 924(c) or whether the jury instructions at his trial misstated the law. Pet. 29-39, 39-40. Those fact-bound issues were not considered by

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[6] The district court based its waiver holding on a decision that was subsequently vacated and remanded by this Court, and in which the court of appeals granted relief on remand. See pp. 4-5, supra. Moreover, the government recently filed a confession of error in this Court in Bousley v. Brooks, 97 F.3d 284 (8th Cir. 1996), petition for cert. pending, No. 96-8516. In that case, the court of appeals held that a challenge under Bailey was barred by procedural default rules. In our view, the court of appeals erred by concluding its analysis without considering whether the defendant could make a sufficient showing of "actual innocence." Brief for the United States in Bousley v. Brooks, No. 96-8516, at 9-11. On remand, the court of appeals would be free to consider those developments in reviewing the district court's waiver holding.

either the district court or the court of appeals, and they accordingly do not warrant review by this Court in the first instance.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of the position asserted in this brief.

Respectfully submitted.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by first class mail, postage prepaid, on this 18th day of August 1997.

See Attached Service List

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